

Normandy Venture Limited Partnership,

BEFORE THE ZONING BOARD

Petitioner

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OF HOWARD COUNTY, MARYLAND

Zoning Board Case No. 1090M

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DECISION AND ORDER

On March 3 and March 9, 2011, the Zoning Board of Howard County considered the petition of Normandy Venture Limited Partnership for an amendment to the Zoning Map of Howard County so as to reclassify the 24.43 acre subject property to place a TNC (Traditional Neighborhood Center) Overlay District over the underlying B-2 Zoning District. The subject property is located on the north side of U.S. 40 approximately 1,230 feet northeast of Rogers Avenue, and on the east side of Rogers Avenue approximately 1,120 feet northeast of U.S. 40, and is identified as Tax Map 18, Grid 19, Parcel 75, Lots A, B and C.

The notice of the hearing was advertised, the subject property was posted and the adjoining property owners were mailed notice of the date of the hearing as evidenced by the certificates of advertising, posting and mailing to adjoining property owners, all of which were made part of the record. Pursuant to the Zoning Board’s Rules of Procedure, all of the reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning (“DPZ”), and the Planning Board’s Recommendation were made part of the record. Both the DPZ and the Planning Board recommended granting the requested rezoning. An Exhibit List, showing the exhibits introduced into the record of the hearings, is attached to this decision.

The Petitioner was represented by William E. Erskine, Esq., Miles and Stockbridge, P.C. The Zoning Counsel, Eileen Powers, Esq., appeared pursuant to Section 16.1000 of the Howard

County Code to support the comprehensive zoning of the subject property. Kathleen Birrane, Esq. appeared on behalf of a protestant, Lisa Markovitz. Several other nearby residents not represented by legal counsel also appeared in opposition to the proposed rezoning.

After careful evaluation of all the information presented, the Zoning Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The subject property is the site of the Normandy Shopping Center (“Normandy”), the first and oldest shopping center in Howard County. Based on the information in the petition, DPZ’s Technical Staff Report, the Zoning Counsel’s exhibits and at least some of the testimony of David Moxley, project manager for the Petitioner, the history of the subject property’s zoning and development, as detailed below, is not in dispute. The first stage of Normandy was constructed in 1961 in the northeastern part of the subject property, with a later addition to the shopping center made in the 1970s, a freestanding bank constructed near U.S. 40 in the late 70s/early 80s and a second stage of development completed in the 1980s, consisting of a second retail building and parking lot east of Normandy Center Drive and a third office/retail building and parking west of Normandy Center Drive.

The subject property, comprised of Lots A, B and C, has been commercially zoned since 1961, and has been zoned B-2 since 1993. The 5.9 acre Lot C, the furthest parcel from U.S. 40, has been undeveloped in its commercial zoning, except for temporary parking lot use, since 1961. The petition does not include a portion of Lot B, which is subject to a long-term lease with High’s of Baltimore, Inc.

Normandy has been a very successful shopping center with very high tenant occupancy rates from 1961 until after 2000, with a Safeway grocery store serving as an effective anchor at a prime location off U.S. 40. Safeway bought out of its lease and closed in 2009.

The subject property, along with other adjacent properties and some properties across U.S. 40, totaling 46.38 acres, was proposed for a TNC Overlay to the underlying B-2 zoning as part of the 2005 Comp Lite process as map amendment number 18.80. Comp Lite was a reconsideration of the 2004 Comprehensive Zoning of certain properties, including those in the Route 40 Corridor such as map amendment number 18.80. Also considered for the first time in the Comp Lite process was the proposed zoning category of the TNC Overlay District. The Department of Planning and Zoning and the Planning Board recommended approval of the TNC Overlay for map amendment number 18.80. The County Council, while it did adopt the TNC Overlay District as a new zoning category as part of Comp Lite, rejected the TNC Overlay over the underlying B-2 zoning of the properties of map amendment number 18.80, including the subject property. The County Council did grant TNC Overlay zoning for several other properties as will be detailed below.

2. The subject property is located northwest of, and has frontage on, U.S. 40. It is also east of, and has frontage on, Rogers Avenue. As stated above, the subject property is a combination of three lots, A, B and C. The property is bisected by Normandy Center Drive, a private road which connects Rogers Avenue and U.S. 40. The area to the east of Normandy Center Drive consists of all of Lots A and C and part of B; the area to the west of Normandy Center Drive contains the rest of Lot B except for the High's parcel as noted above. The eastern half of the subject property contains the original shopping center, including the vacant Safeway

store, the bank building and the angled shopping center building, with parking for all those uses. The western area contains an L-shaped retail/office building and parking.

The subject property is roughly triangular in shape, and becomes more narrow in the area of Lot C the further one gets away from U.S. 40. The subject property has steep topography at its northeast border with the residential subdivision of Normandy Heights. The elevation drops from 432 feet at this boundary to about 370 feet in the center part of the subject property and further drops off to an elevation of 310 feet at the southernmost point of the subject property. The elevation of the residential lots in Normandy Heights is 20-50 feet above the commercial buildings in the eastern portion of the subject property.

The subject property is surrounded by R-20 zoning and development on its eastern, northeastern, northern and northwestern boundaries. To the west across Rogers Avenue is R-A-15 zoning and the developed Town and Country apartment complex. Immediately to the southwest of the subject property is the site of the now closed motor vehicle sales facility. Further to the south across U.S. 40 are several B-2-zoned retail businesses.

3. Mr. Moxley detailed in his testimony a fairly extensive negotiation process between the Petitioner and Safeway for an extension of their lease and the improvements which would be necessary to effectuate that. He testified that this process began in 1999, and that Safeway exercised two, five-year lease extension options before they departed in 2009. Mr. Moxley testified that Safeway told Petitioner that based on changes in grocery store market dynamics, it would need to increase its square footage footprint from 30,000 square feet to 59,000 square feet in order to be able to continue operating a grocery store at the subject property. This negotiation process was ongoing at the time of the 2005 Comp Lite, although Petitioner acknowledged that it did not inform the County of this fact. Mr. Moxley testified that ultimately physical issues with

the subject property prevented Petitioner from meeting Safeway's demands for a 59,000 square foot footprint, and that negotiations subsequently broke off and Safeway departed in 2009. Mr. Moxley testified that Safeway was unwilling to use Lot C for any redevelopment plans due to its distance from U.S. 40 and the likelihood that other development on the subject property would eliminate the visibility necessary for "big box" anchor uses. Mr. Moxley also testified that the Petitioner told Safeway that it was unwilling to restrict development in the front of the subject property to the extent desired by Safeway to ensure visibility because of economic viability concerns for the property as a whole and because such a pattern of development would be contrary to the recommendations of the Route 40 Enhancement Study as to development along the frontage of U.S. 40.

Mr. Moxley testified that since Safeway left Normandy, the vacancy rate had reached 30% and was continuing to grow. He also testified that in his opinion, Normandy, under its present situation, was struggling and had become obsolete as a shopping center, and that the time for its redevelopment had arrived.

Mr. Moxley acknowledged that since 1984 no major improvements had been undertaken at Normandy other than routine maintenance. He also testified that the Petitioner had made efforts to replace the departing tenants through traditional brokerage/leasing methods, including efforts to attract a smaller "boutique" grocery store to Normandy. Mr. Moxley testified that both Wegmans and Weis had rejected the subject property as a location for their development plans.

4. Mr. Mark Mueller, a commercial real estate broker employed by Petitioner testified as an expert as to the marketing efforts he had undertaken on behalf of the Petitioner to lease the vacant stores in Normandy, particularly the anchor store, and the viability of Normandy as a shopping center under the current circumstances.

Mr. Mueller testified that it is his job to be familiar with all shopping centers in the area market, including Howard County, and that he was therefore familiar with Normandy prior to Petitioner hiring him as its real estate listing agent. He testified that when Normandy had the anchor of Safeway, it was a relatively successful shopping center. He testified that in recent years there has been a shift in the retail market away from the way Normandy has been configured over the years – a 30,000 square foot grocery store serving as an anchor for various other retail stores. Mr. Mueller testified that there has been overall reduction in the number of retailers, and that how they are configured has changed in the market. For example, he pointed out that video stores, a former staple of shopping centers no longer exist, that clothing stores now locate in outlets or freestanding “big box” stores rather in small tenant retail in shopping centers, that restaurants locate more often within large “big box” grocery stores such as Wegmans, and that department stores are usually freestanding “big box” stores as well. He also testified that the trend is also towards much larger “big box” grocery stores, 55,000 square feet and larger, serving as anchors for shopping centers

Mr. Mueller further testified that the U.S. 40 commercial corridor west of Route 29 was much more popular than that of the corridor east of 29 in which Normandy was located. He indicated that commercial properties rented for \$5-10 less per square foot in the market east of 29 than the one west of 29. Mr. Mueller testified that Normandy was located in a neighborhood-oriented market defined by the barriers of Route 29 and Patapsco Park. Mr. Mueller indicated that Normandy was in a market of its own, not part of the west of 29 market, and that its market had become “tired”.

Mr. Mueller recounted that in the 2005 timeframe the commercial retail market was “fun”. The vacancy rate was generally around 5% then, and that tenants sometimes had to wait to

rent commercial/retail space at that time. Mr. Mueller indicated that since the recession of 2008 began, there have been vacancies in places that never had them before. Mr. Mueller testified that the vacancy rate for the east of 29 retail market is about 3-4% without counting Normandy and about 15% counting Normandy. He indicated that the overall vacancy rate for Normandy is about 30% in contrast to Chatham Station which is 100% leased and Enchanted Forest which has about a 5% vacancy rate. Both Chatham and Enchanted Forest are in the west of 29 Route 40 retail market. Mr. Muller testified that BAE's estimate of 680,000 square feet of supportable new retail for the Route 40 area (p. 20 of the Route 40 Corridor Analysis) may have been a reasonable estimate for the pre-recession period but that now 200,000 square feet of new retail space may be the maximum amount that could be absorbed in this market.

Mr. Mueller acknowledged that for the 6-9 month time period just prior to the zoning hearing, his recommended strategy was to wait for the zoning decision before additional traditional marketing was undertaken. However, Mr. Mueller also testified that previous to that time, and even recently, all traditional marketing efforts had been undertaken to find a grocery store as a replacement anchor but that those efforts had proven to be difficult and unsuccessful, including efforts to find a traditional anchor such as Food Lion or a specialty grocery anchor such as Trader Joe's or Mom's Organic market. He indicated that the size of the Safeway store, its location in the east of 29 market and its location on the subject property perpendicular to U.S. 40 have all been issues in terms of marketing. Mr. Mueller acknowledged that an international grocer had been interested in locating in the Safeway store but that he had advised against leasing to them based on the low rent to be paid, and the fact that it would not be an effective anchor store.

Mr. Mueller testified that the best way to market to prospective anchors is to contact them directly and that signage is not an effective marketing tool. He also acknowledged that the subject property could be redeveloped under B-2 zoning but that the subject property is too big without a residential component to find sufficient tenants to fill it. Mr. Mueller indicated that the Petitioner's plan was to actually decrease the square footage of retail in the redeveloped Normandy from the current 188,000 square feet to about 170,000 square feet.

On the issue of whether renovation should precede any effort to market Normandy to prospective anchors, Mr. Davis testified that he wouldn't advise the Petitioner to spend major renovation dollars until an anchor was secured since lack of renovation probably was not the principal reason for not being able to attract an anchor, especially a 55,000 square foot anchor.

5. Mr. Mark Burns testified on behalf of Ms. Markovitz on the subject of the continuing viability of Normandy. Mr. Burns testified as an expert in the field of organizational and planning strategy for businesses, including commercial real estate business and governmental entities, including Homeland Security. Mr. Burns is not a licensed realtor or real estate appraiser. Mr. Burns acknowledged that he had not consulted with any Howard County businesses, including any U.S. 40 businesses. He also acknowledged that he had not heard Mr. Mueller's testimony and had not read the BAE Route 40 Corridor Economic Analysis.

Mr. Burns testified that there were 2,719 apartment units within 1 mile of the subject property and 3,566 units within 3 and ½ miles of the subject property. He characterized the area around Normandy as a high density area for apartments.

Mr. Burns testified that he believes Normandy remains viable despite the absence of an anchor store. He indicated that Normandy is located in an area of high passing traffic volumes and high income residents, which should help Normandy's viability.

Mr. Burns noted that the marketing materials for Centennial Crossing, another retail center owned by the same principals as the subject property, characterized the location of Centennial Crossing, which is west of Route 29, as a “premier location”. Mr. Burns testified that this positive description of the Centennial Crossing shopping center does not jibe with the characterization of the Normandy Center as a failing shopping center.

Mr. Burns also testified that there had been no substantial improvements to Normandy since 1984 and that this was a bad business strategy to delay improvements which could make Normandy more marketable to prospective tenants.

Mr. Burns testified that it is hard to find marketing materials on the subject property, including a lack of signs, and that Petitioner had not undertaken an aggressive marketing campaign to reduce the vacancy rate of its tenants. Mr. Burns offered no opinion on Mr. Mueller’s contentions as to the difference in the markets between businesses west and east of Route 29 along the U.S. 40 Corridor. The Board notes that the Route 40 Enhancement Study (Tab F of Applicant’s Exhibit 11) confirms on page 6 the different character of the Route 40 Corridor east and west of U.S. 29 - “east of US 29, the corridor has a higher percentage of minorities, a higher percentage of attached dwelling units (mostly apartments), and a much lower household income (about \$42,000 compared to the County’s 1999 median household income of \$74,167) than west of US 29.”

6. While the petition included a concept plan, this case was not filed as a documented site plan case under the criteria provided for in Section 100.G.2. of the Howard County Zoning Regulations.

7. The Petitioner's argument for the requested TNC Overlay zoning on the underlying B-2 zoning is based on alleged mistake in the last comprehensive zoning, which in this case is the 2005 Comp Lite.

The subject property was one of numerous properties reconsidered for rezoning in Comp Lite, which was subsequent to the 2004 Comprehensive Zoning. The subject property was specifically considered for TNC Overlay zoning in the 2005 Comp Lite process, along with several other properties, and was ultimately not granted that requested overlay zoning. The TNC Zone as a zoning category and concept of mixed-use development in the Zoning Regulations was created in the 2005 Comp Lite process. Petitioner sets forth several alternative theories of mistake in comprehensive zoning, some of which are based on mistakes made at the time of the 2005 Comp Lite and some based on subsequent events since the 2005 Comp Lite.

8. The Petitioner's contentions as to mistake in comprehensive zoning are contained in its petition, and are based principally on the testimony of its planning witness, Sean Davis and the exhibits presented by Mr. Davis, particularly, Applicant's Exhibit 3 which is a summary of those arguments. The evidence relating to these mistake arguments, both in support of and in opposition to, are summarized below:

a. During Comp Lite, the County Council mistakenly believed that Normandy Center Drive was a public road and that Normandy was divided by this public road and therefore not a large enough contiguous property to accommodate a mixed use development, when in fact, Normandy Center Drive was a private road and the subject property could be redeveloped as one contiguous property. In support of this contention Mr. Davis referenced three documents: 1) The 2000 Howard County General Plan Transportation Map, which showed Normandy Center Drive to be a major collector road rather than a private road; 2) The September 2010 U.S. Route 40

Streetscape Master Plan, which described Normandy Center Drive as a “Neighborhood Center Street” with a “right-of-way” indicating a public road; and 3) Page 24 of the Route 40 Corridor Market Analysis, a planning document prepared by BAE, a planning consultant, for DPZ as a basis for DPZ’s recommendations for the 2005 Comp Lite, in which BAE stated that “the only site large enough to accommodate such a [mixed-use] development is the property acquired by the County for expansion of the government center”, when the subject property, if considered as a contiguous property, would be as large as the County property and also able to accommodate a mixed-use development.

Mrs. Rura presented Protestant’s Exhibit 3, a March 2, 2005 letter she submitted to the County Council during the Comp Lite process opposing the TNC request, in which Normandy Center Drive was clearly identified as private road. Mr. Davis indicated that he believed the County Council would have put more weight on the General Plan’s seeming recognition of Normandy Center Drive as a public road than on the testimony of Mrs. Rura. Mr. Davis also acknowledged that he was not aware of any facts to show that the County Council’s decision to not grant TNC zoning for the subject property during Comp Lite was connected to Normandy Center Drive’s alleged mistaken status as a public road. Mr. Davis also conceded that it was possible that the BAE quote on page 24 of the Route 40 Corridor Analysis could have been referring to the County property as the only completely undeveloped property in the corridor of that size, and that the subject property was not considered for mention in the report because it was largely developed;

b. During Comp Lite, the County Council mistakenly believed that Rogers Avenue between U.S. 40 and Normandy Center Drive was a local road due to a planned relocation of Rogers Avenue from U.S. 40 to Town and Country Boulevard, when in fact this

section of Rogers Avenue functions as a major collector/minor arterial road, and will continue to do so based on the abandonment of the relocation project, and therefore will be able to accommodate more traffic than what the County Council believed it was able to handle. In support of this contention Mr. Davis referenced the 2000 Howard County General Plan Transportation Map, which showed the planned relocation of a minor arterial roadway between U.S. 40 and Town and Country Boulevard, with the existing section of Rogers Avenue between U.S. 40 and Normandy Center Drive being shown as a local road. Mr. Davis acknowledged that he was not aware of any facts to show that the County Council's decision to not grant TNC zoning for the subject property during Comp Lite was connected to the existing or planned classification of Rogers Avenue in relation to traffic. However the Board notes that the BAE Report (p. 4) specifically noted that "traffic congestion threatens the long-term success of the corridor. . . as the congestion increases along Route 40, shoppers may become more reluctant to battle traffic and search for other shopping districts to meet their needs";

c. During Comp Lite, the County Council mistakenly believed that Normandy was fully developed, when in fact the approximately 5.9 acre Lot C, comprising $\frac{1}{4}$ of the subject property, has never been developed under commercial zoning. In support of this contention, Mr. Davis referenced page 1 of the Route 40 Corridor Market Analysis, in which BAE stated that "there is only one large "greenfield" site in excess of five acres available for new development, and that site has been acquired by the County for future consolidation of its government center", when in fact, Lot C of the subject property was also a "greenfield" site in excess of five acres available for development. Mr. Davis did acknowledge that Lot C's undeveloped condition is a physical fact that is readily observable.

A corollary contention (in “Additional Considerations”) advanced by Mr. Davis is that the assumption that the entire Normandy property is ideally suited for B-2 General Business development is incorrect based on the physical configuration of the property in that Lot C is not visible and is distant from U.S. 40;

d. During Comp Lite, the County Council mistakenly believed that Normandy enjoyed a high occupancy rate with very few vacancies, when in fact Normandy’s principal anchor, Safeway, had informed the Petitioner that it planned to close the grocery store in Normandy unless they could redevelop a 55,000 square foot building, which, after numerous attempts, could not be provided. In support of this contention, Mr. Davis referenced page 1 of BAE’s Route 40 Corridor Market Analysis which stated “Most of the corridor’s shopping centers have a strong tenant mix. Commercial property owners and managers along Route 40 report little difficulty keeping retail spaces occupied with available retail spaces leased quickly. On average, available retail space spends less than 30 days on the market before a new tenant occupies the space. . . There are limited vacancies in the corridor, with the majority of the available space in medium-sized spaces of 3,000 to 5,000 square feet in a few individual shopping centers.”

The corollary “subsequent events” mistake argument advanced by the testimony of Mr. Davis (in “Additional Considerations”), Mr. Moxley and Mr. Muller is that the once strong retail market of the eastern section of the U.S. 40 corridor is now characterized by numerous large tenant vacancies creating a “ghost town” appearance on the subject property and other nearby businesses;

e. During Comp Lite, the County Council mistakenly believed that the Northern Region School District was at capacity and would be closed until 2008, when in fact the construction of the Veterans Elementary School and the redistricting of Patapsco middle School

had resulted in the Northern Region District School District being expected to be open for the entire 10 year period covered by the open/closed school chart from 2005-2015. In support of this contention, Petitioner presented Applicant's Exhibit 4, the open/closed school charts adopted by the County Council for 2004, 2005 and 2010. Mr. Davis acknowledged that he was not aware of any facts to show that the County Council's decision to not grant TNC zoning for the subject property during Comp Lite was connected to the APFO open or closed status of the schools which would serve any residential development on the subject property; and

f. During Comp Lite, the County Council mistakenly rezoned the Chatham Station Shopping Center and three corners of the St. John's Lane/Frederick Road intersection to TNC because Chatham Station had just been redeveloped in 2000 with long term leases and the three St. John's Lane/Frederick Road TNC-zoned areas were almost ½ mile distant from the Route 40 corridor, were separated from Route 40 by residential zoning and were relatively small properties that had active retail uses in place.

The corollary "subsequent events" argument advanced by the testimony of Mr. Davis is that it is clear from the County Council worksession notes (Applicant's Exhibit 7) that the County Council wanted to have at least one "pilot project" (Mr. Davis' term) for the TNC Overlay District, created in the Comp Lite process, and that a TNC Overlay District was rejected in Comp Lite for the amendment number 18.80 properties, including the subject property, in favor of TNC for the St. John's Lane/Frederick Road and Chatham Station properties. Corroborating the worksession notes is the March 4, 2005 article from the Baltimore Sun on the Comp Lite worksessions (Tab M of Exhibit 11) in which Chris Merdon, the Councilman representing the area of the subject property and the adjoining properties, is quoted as saying "It seems like we're jumping into the TNC concept without knowing if it would work" and was also

reported to have said that, allowing up to 20 residential units per acre at the 46-acre Normandy Shopping Center, or at the Chatham center farther west, may be too many. The Board notes that the 20 units per acre density for property adjacent to Route 40 was maintained in the TNC Regulations, and became applicable to the Chatham Station properties upon TNC Overlay zoning. Subsequent events to the 2005 Comp Lite have shown that neither of these properties has provided this “pilot project” for the TNC Overlay to test whether the “TNC concept . . . would work”, and the evidence is that there is no reasonable prospect for TNC development in either TNC area in the reasonably foreseeable future, while the subject property is ready to move forward with a TNC development if properly zoned; and

g. During Comp Lite, the County Council assumed that the Howard County Government Complex would be constructed at the intersection of U.S. 40 and Rogers Avenue but subsequent events have shown that assumption to be incorrect since the County decided to renovate its existing government facilities at Courthouse Drive and Rogers Avenue and surplus the property at U.S. 40 and Rogers avenue. See “Additional Considerations”.

9. Mr. Davis gave several reasons why giving the subject property the TNC Overlay zoning as an option to the underlying B-2 zoning was appropriate. Those reasons were the following:

a. The Route 40 Enhancement Study (p.13) recognized the desirability of the creation of mixed use centers, such as the TNC Overlay, both in terms of quality of life and encouraging lessening of traffic through pedestrian-oriented designed developments;

b. TNC would allow additional apartments which could help to support the existing retail market and respond to the demand for more apartments;

c. TNC development will require compliance with the Route 40 Manual, which will produce higher quality development;

d. TNC redevelopment will result in better adherence to the new environmental/storm water management regulations; and

e. TNC development will allow the residential development on Lot C to act as a transition between the commercial development on Normandy and the surrounding residential uses.

Those in opposition to the proposed rezoning provided testimony that TNC Overlay zoning was not necessary for the redevelopment of the subject property because Normandy redevelopment could occur under the existing B-2 zoning of the subject property.

Mr. Mickey Cornelius, petitioner's traffic expert, provided testimony, which was not rebutted, that redevelopment under TNC zoning assuming the development proposed under the Concept Plan of 200 dwelling units and 176,000 square feet of office/retail, would not generate significantly more traffic than is generated by the fully occupied current development on the subject property.

10. The Board makes the following findings of fact based on the evidence presented and the contentions made with respect to mistake in comprehensive zoning:

a. The subject property was one of several combined properties in the Normandy area specifically considered for TNC Overlay zoning to its underlying zoning during the 2005 Comp Lite Process as amendment number 18.80;

b. In making the decisions on Comp Lite with respect to the Route 40 Corridor, including the decision to implement the TNC Zoning District concept and to decide what properties would be given the TNC Overlay option on the zoning map, DPZ and the County

Council would have considered the Route 40 Corridor Market Analysis, a report prepared by BAE, a consultant hired by DPZ to make recommendations concerning Route 40-related Comp Lite zoning decisions;

c. Amendment number 18.80 in Comp Lite, which included the subject property and several other adjoining properties and properties across Route 40 from Normandy, was rejected by the County Council for TNC Overlay zoning to the underlying B-2 zoning, while TNC Overlay zoning was granted for two other areas, the Frederick Road/St. John's Lane area and the Chatham Station area;

d. The January 31, 2005 notes of the County Council's Comp Lite worksession indicate that the Council's discussions as to where to implement the TNC Overlay, a mixed use category specifically designed for the U.S. 40 Corridor, were to occur in conjunction with the discussions of the TNC Overlay District and its proposed provisions, since the TNC Overlay District was considered as part of, and created by, the 2005 Comp Lite process, and that the County Council indicated its intent in those later discussions, which occurred on March 1, 2005, as evidenced by the notes of the worksession and the Baltimore Sun article, to not implement the new TNC District at both the Normandy and Chatham locations but to try it at one of those locations to see if it would work, based at least partially on concerns that the 20 residential units per acre could be too intensive for those areas;

e. In the County Council's final action to deny the TNC Overlay for amendment number 18.80 (amendment 8 of Council Bill 2-2005), the Council indicated the area for 18.80, including the subject property, was a "future mixed use" (Applicant's Exhibit 8);

f. Petitioner made several contentions of mistake in the B-2 zoning of the subject property without a TNC Overlay based on alleged mistakes of fact or mistaken assumptions

made at the time of Comp Lite, namely the contentions described in findings of fact 8.a through 8.f. above. The Board will make findings as to each of these contentions and supporting and opposing evidence as provided below:

1. With respect to the alleged mistake in zoning described in finding of fact 8.e. related to the County Council's assumptions as to the status of the area schools as either open or closed at the time of the 2005 Comp Lite, the Board finds that no convincing evidence was presented to show that this was a factor that was in any way connected to the County Council's decision to not grant TNC Overlay zoning to the subject property as part of Comp Lite. Therefore, Petitioner has shown no convincing evidence that the County Council's decision to not grant TNC Overlay zoning to the subject property was premised on incorrect facts at the time of Comp Lite related to the open or closed status of area schools;

2. With respect to the alleged mistake in zoning described in finding of fact 8.a. related to the County Council's assumptions as to the status of the public versus private ownership of Normandy Center Drive, the Board finds that, regardless of whether the County Council would have relied on the testimony of Mrs. Rura given during the Comp Lite hearings that Normandy Center Drive was in fact a private road or the official County documents that seemed to indicate mistakenly that it was a public road, there was no convincing evidence presented to show that Normandy Center Drive's status as a private road was connected to the County Council's decision to not grant TNC zoning to the subject property as part of Comp Lite. The Board also finds that BAE's statement that the County property was the only property large enough to accommodate a mixed-use development was only incorrect if they were referring to all properties, including partially developed properties, not just undeveloped properties, and that the Board finds that BAE was most likely referring only to undeveloped properties in this reference.

Therefore, Petitioner has shown no convincing evidence that the County Council's decision to not grant TNC Overlay zoning to the subject property was premised on incorrect facts at the time of Comp Lite related to the mistaken status of Normandy Center Drive as a public road.

3. With respect to the alleged mistake in zoning described in finding of fact 8.b. related to the County Council's assumptions as to Rogers Avenue status as a local road, there was no convincing evidence presented to show that this mistaken fact was connected to the County Council's decision to not grant TNC zoning to the subject property as part of Comp Lite. However, the fact that this section of Rogers Avenue was reaffirmed as major collector/minor arterial road due to the abandonment of the planned relocation project, when considered in combination with other related events occurring subsequent to Comp Lite, is convincing to show that premises upon which the decision to not grant TNC Overlay zoning to the subject property in Comp Lite have been shown to be incorrect or invalid with the passage of time. These findings will be addressed in finding of fact 10.g. below.

4. With respect to the alleged mistake in zoning described in finding of fact 8.c. related to the undeveloped status of Lot C, the Board finds that while the undeveloped quality of Lot C may have been readily visible, that fact could reasonably have been obscured by the incorrect statement in the BAE report that the only "greenfield" (undeveloped) site over 5 acres in the Route 40 Corridor was the County property since Lot C clearly met that criterion. Unlike the factors of the private ownership of Normandy Center Drive and road classification of Rogers Avenue, there is evidence that the perceived lack of non-County owned undeveloped sites for future development opportunities may have been connected to the County Council's decision to not grant TNC Overlay zoning for the subject property because the lack of

undeveloped sites in the Route 40 Corridor was highlighted by BAE, the County's consultant, "as the most noticeable weakness along the Route 40 Corridor" (p. 1 of the BAE Report);

5. With respect to the alleged mistake in zoning described in finding of fact 8.d. related to the County Council's assumptions as to the economic viability of Normandy at the time of the 2005 Comp Lite, the Board finds that no convincing evidence was presented that Normandy had high vacancy rates in 2005 or that information existed at that time as to Normandy's lack of economic viability that if known would have made a difference in the County Council's decision as to whether to grant TNC Overlay zoning for Normandy. Petitioner's real estate market witness, Mr. Mueller, acknowledged that Normandy was a reasonably successful shopping center while it had Safeway as an anchor, and the negotiations between Safeway and Normandy were not over, and Safeway's decision to leave Normandy were not finalized until 2009. While BAE's assessment that Normandy was part of a strong retail market may have been slightly overstated, it cannot be said to have been incorrect as of 2005. The 30% vacancy rates in Normandy did not exist in 2005. The relatively less robust economic conditions of the east-of-29 U.S. 40 retail market as compared to the western market were factors which were known in 2005 and not acted on by the County Council in its TNC zoning decisions. However, the fact that economic conditions worsened significantly for Normandy since the 2005 Comp Lite, particularly after the 2008 recession, but much more so for Normandy than for other Route 40 Corridor properties, particularly for the more healthy west-of-29 market, is convincing evidence to show that the premises upon which the decision to not grant TNC Overlay zoning to the subject property in Comp Lite have been shown to be incorrect or invalid with the passage of time. These findings will be addressed in finding of fact 10.g. below;

6. With respect to the alleged mistake in zoning described in finding of fact 8.f. related to the County Council's mistake in choosing the other two areas for TNC Overlay Zoning rather than the subject property as part of amendment number 18.80 in Comp Lite, the Board finds that no convincing evidence was presented to show that these "mistakes in judgment" were based on incorrect facts or facts not known at the time of the 2005 Comp Lite. However, the fact that neither of the two TNC Overlay sites has developed, is convincing evidence to show that the premises upon which the County Council based its decision to not grant TNC Overlay zoning to the subject property in Comp Lite have been shown to be incorrect or invalid with the passage of time. These findings will be addressed in finding of fact 10.g. below.

g. Petitioner made several contentions of mistake in the B-2 Comp Lite zoning of the subject property without the TNC Overlay based on events occurring subsequent to the 2005 Comp Lite which have shown that the premises upon which that decision was based have been shown to be incorrect or invalid with the passage of time, namely the three contentions described in findings of fact 8.b., 8.g. and 10.f.3.; 8.d. and 10.f.5; and 8.f. and 10.f.6. above. The Board makes findings as to each of these three "subsequent events"/mistake contentions and the related supporting and opposing evidence in the same order as referred to above, as follows:

1. The combination of the reaffirmation of Rogers Avenue between U.S. 40 and Normandy Center Drive as a major collector/minor arterial road, better able to handle Normandy generated traffic, due to the abandonment of the planned relocation project for a new road between U.S 40 and Town and Country Boulevard, and the abandonment of the development of the new County Complex at U.S. 40 and Rogers Avenue and the consequential reduction of its substantial traffic generation (stated to be 1000 peak hour trips by Mr.

Cornelius), constitute events subsequent to the last comprehensive rezoning which have shown that the premises upon which the County Council's decision to not grant TNC Overlay Zoning have proven to be incorrect with the passage of time. One of the premises upon which the decision to not grant TNC Overlay zoning was based was the uncertainty as to whether a TNC Overlay District development at Normandy "would work" (in Councilman Merdon's words) in terms of handling the Normandy traffic, traffic congestion being acknowledged to be a particular Route 40 Corridor problem in the BAE Report. Based on the previously assumed conversion of Rogers Avenue to a local road, less able to handle traffic, and the assumed planned development of the County Complex almost directly across the U.S. 40/Rogers Avenue intersection from the subject property, there is evidence to show that the Normandy generated traffic under TNC would reasonably have been seen in 2005 as a negative factor in making the TNC "work";

2. The departure of Safeway as Normandy's anchor store in 2009, the inability of Petitioner to find an effective replacement anchor and the continually worsening economic viability of Normandy constitute events occurring subsequent to the 2005 Comp Lite, which shows that the County Council's premise that Normandy did not need TNC Overlay zoning in order to effectively redevelop has proven incorrect with the passage of time. The County Council reasonably determined that Normandy was fairly successful in 2005 without TNC given its still low vacancy rates at that time and the presence of Safeway as its anchor. Safeway's 2009 departure exacerbated the already worsening retail market brought on by the 2008 recession, but affected the particular east-of-29 market much more adversely than the distinct and less vulnerable west-of-29 retail market.

In this regard, the Board accepts as convincing the testimony of Petitioner's retail market consultant, Mr. Mueller, more than the opposition's planning and business strategy witness, Mr.

Burns on Route 40 real estate market issues. The latter's citation of positive ("premier location") marketing materials language used by an affiliated company of the Petitioner for Centennial Crossing, a commercial development in the west-of 29 market, indicates his lack of knowledge or acceptance of the established differences between the west v. east of 29 markets as supported by the testimony of Mr. Mueller and the other documentary evidence in the record. The Board also rejects Mr. Burns' conclusion that Normandy is still viable and could be restored to its previous Safeway-as-anchor economic viability with some renovation and improved marketing. The Board finds that granting the subject property the TNC option will improve its chances of finding an effective anchor according to the changing retail market trends as testified to by Mr. Mueller, which will in turn allow it to make the renovations and redevelopment needed at Normandy. The Board is also persuaded by Mr. Mueller's testimony that the traditional marketing efforts advocated by Mr. Burns are not as effective as the direct contact approach with prospective anchor tenants as advocated by Mr. Mueller, so that any lessened or lack of activity in Normandy's traditional marketing efforts is reasonable and understandable. The Board is not persuaded that Petitioner is purposely not trying to replace its tenants in an effort to justify its request for rezoning. The Board finds that Mr. Mueller's reason for advising Normandy to not accept certain prospective anchors because they will not be effective in attracting other tenants, to be reasonable and not part of a purposeful holding pattern or purposeful effort at marketing failure.

The Board is convinced by the evidence that the traditionally less-healthy east-of-29 retail market, in particular Normandy, may need the boost of the mixed use redevelopment opportunities afforded by TNC to recover from the subsequent event of the loss of its anchor

store and the subsequent difficulties in obtaining an effective substitute anchor store in a changed retail market; and

3. The fact that the two areas which were zoned with the TNC Overlay to their underlying zoning, the St. John's Lane/Frederick Road area and the Chatham Station area, have not developed using the optional TNC Overlay development process, and are extremely unlikely to so develop in the foreseeable future and/or prior to the next comprehensive zoning, constitutes an event occurring subsequent to the 2005 Comp Lite, which shows that the premises upon which the County Council's decision to not grant TNC Overlay zoning to the subject property have proven to be incorrect or invalid with the passage of time. The County Council created the TNC Overlay District to provide a usable alternative to underlying zoning for Route 40 Corridor properties which would implement the purposes of the TNC concept- "to provide for the development of pedestrian-oriented, urban activity centers with a mix of retail, service, office and residential uses", and the premise of the 2005 Comp Lite was that implementation of these TNC concepts, the "pilot project", to see if the TNC concept "would work", would be provided by one or both of these properties' TNC development, and that TNC zoning and development of the subject property as TNC was not necessary to implement the TNC concept even though the subject property was identified as a future mixed use. As stated above, this premise has proven to be incorrect with the passage of time-the properties zoned for the TNC Overlay option will not provide the necessary pilot project for TNC and granting it to the subject property will.

11. The Board makes the following findings of fact on the issue of the appropriateness of granting TNC Overlay zoning for the subject property, assuming that rezoning is permitted based on mistake in comprehensive zoning:

a. The Board is convinced by the testimony of Mr. Davis, as outlined in findings of fact 9.a.through e., which it finds persuasive, that it is appropriate to grant TNC Overlay zoning on the subject property for the reasons stated by Mr. Davis. The County Council intended that the TNC Overlay concept would be a new development concept to help revitalize and redevelop the Route 40 Corridor, and the Board is convinced that granting TNC Overlay zoning to the subject property will afford the opportunity for Normandy to redevelop as a mixed use that will fulfill the purposes of the TNC Overlay District.

While, the Board notes that the opposition is correct that much of Normandy could redevelop under the existing B-2 zoning, it also finds that substantial evidence was produced to indicate that the location of Lot C and the fact that it has not developed for 50 years under commercial zoning, leads the Board to find that Lot C is unlikely to develop with commercial uses under B-2 zoning, and that residential development on Lot C under TNC Overlay zoning is appropriate and could act as a transition between the Normandy Center and adjacent residential uses. The Board also notes that TNC Overlay zoning is only another development option for the subject property and that it could still develop under its underlying B-2 zoning. Perhaps most importantly, the Board finds that the redevelopment of Normandy under B-2 would not provide the benefits of TNC development as testified to by Mr. Davis, and would not provide the “pilot project” for the TNC Overlay zone intended by the County Council in the 2005 Comp Lite.

There was no other evidence produced by those in opposition to the TNC Overlay rezoning that convinces the Board that implementation of the TNC Overlay concept on the subject property is inappropriate in terms of adverse impacts or other factors, including traffic generated. The Petitioner’s traffic expert produced convincing evidence that TNC development

is not going to significantly increase traffic over what is produced by the existing Normandy shopping center.

CONCLUSIONS OF LAW

1. The Petitioner, as one seeking a piecemeal zoning reclassification, has the burden of demonstrating mistake in the last comprehensive zoning of the subject property and/or change in the character of the neighborhood of the subject property since the last comprehensive zoning. If this burden is met, the Board is permitted, but not compelled to grant the rezoning request. Petitioner relied only on alleged mistake in the last comprehensive zoning, the 2005 Comp Lite, as its justification for rezoning in this case.

2. There is sufficient evidence in the record regarding mistake in the 2005 Comp Lite zoning of the subject property in the B-2 Zoning District without a TNC Overlay District, as provided in the Board's findings of fact above, to overcome the strong presumption of correctness attached to that comprehensive zoning.

3. Petitioner has met the onerous burden of proving strong evidence of mistake in the comprehensive zoning of the subject property sufficient enough to permit the requested rezoning of the subject property so as to place a TNC Overlay Zoning District on the underlying B-2 zoning of the subject property, as provided in the Board's findings of fact above.

4. Petitioner has demonstrated mistake in comprehensive zoning based on evidence supporting one contention of mistake made at the time of the 2005 Comp Lite, as provided in finding of fact 10.f.4., and evidence supporting several contentions of mistake which have been established by events occurring subsequent to the 2005 Comp Lite, which have shown that the assumptions and premises underlying the Council's decision to withhold TNC Overlay Zoning

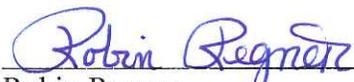
for the subject property in the 2005 Comp Lite have proven incorrect with the passage of time, as provided in findings of fact 10.g.1. through 3.

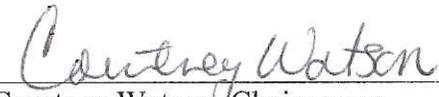
5. The Petitioner has presented sufficient evidence for the Board to conclude that the appropriate zoning category for the subject property is the TNC Overlay Zoning District as an overlay to the underlying B-2 zoning as provided in the Board's findings of fact 11, and the Board concludes that TNC Overlay is the appropriate zoning for the subject property as an additional overlay option to the underlying B-2 zoning of the subject property based on those findings of fact.

Based on the foregoing reasons, the Zoning Board of Howard County, Maryland on this 13th day of July, 2011, hereby **GRANTS** the reclassification of the 24.43 subject property to place a TNC Overlay District over its underlying B-2 Zoning District.

ATTEST:

ZONING BOARD OF HOWARD COUNTY


Robin Regner
Administrative Assistant


Courtney Watson, Chairperson

PREPARED BY HOWARD COUNTY
OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR


Mary Kay Sigaty, Vice Chairperson

SEE DISSENTING OPINION
Greg Fox


Paul T. Johnson
Deputy County Solicitor


Calvin Ball


Jennifer Terrasa

ZB 1090M, Normandy Venture Limited Partnership

EXHIBIT LIST

Petitioner's:

1. Memorandum of Understanding – between Normandy Heights Improvement Assn. & Normandy Venture Ltd. Partnership
2. Resume of Sean D. Davis, Landscape Architecture, Principal with LDR International
3. Normandy Center Power Point Slide Presentation
4. Resolution adopted Open/Closed Chart – Resolution No. 71-2004
5. Route 40 Design Manual – July 2010
6. 6- US Route 40 Streetscape Master Plan
7. Handwritten Notes – part of DPZ file from 2005
8. Summary for CB 2-2005; amendments 3/7/05
9. Resume of Mickey Cornelius, Traffic Consultant
10. Resume of Mark Mueller, Commercial Real Estate Broker
11. Petition for Normandy (black book)

Protestant's:

1. Letter to community from Mr. Cohen (undated) as president of Normandy Association
2. Resume for Marc Burns, consultant for commercial real estate
3. Proposal to rezone Normandy from B-2 to TNC dated 3/2/05 (Comp. Zoning 18.80) (testimony of Susan Rura)
4. Letter from DPZ to Susan Rura dated 10/27/88
5. Letter from DPZ to Normandy Venture Ltd. Partnership dated 12/22/98
re: SDP-99-47, Normandy, Private Commercial Road
6. Decision and Order – Board of Appeals No. 315-D, Charles Grim, t/a Normandy Ford, Inc. (dated May 21, 1991)
7. Deed dated 11/12/87 between James Sweeney and The Prudential Investment Co.
8. Google Map of vicinity with numbers 1-3 marked on map with corresponding attached photographs
9A,B,C Photographs of neighborhood

Zoning Counsel Exhibit:

1. Documents from the files of the County Council from 2004/2005 comp. zoning process (Comp. Lite)
2. Documents from the files of the Dept. of Planning and Zoning from the 2004/2005 Comp. zoning process. (Comp. Lite)
3. Planning Board Recommendations on 2004/2005 Comp. zoning amendments (Comp. Lite)
4. Other properties zoned TNC (Traditional Neighborhood Center Overlay) in the 2004/2005 comp. zoning process
5. Other apartments units in the Route 40 Corridor/Rogers Ave. vicinity for which applications have been made or approvals granted.

Normandy Venture Limited Partnership, * BEFORE THE ZONING BOARD
Petitioner * OF HOWARD COUNTY, MARYLAND
*
* Zoning Board Case No. 1090M
* * * * *

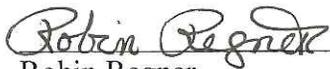
DISSENTING OPINION

While I agree with the majority of the Board that zoning the subject property with a TNC Overlay to the underlying B-2 zoning is appropriate, I disagree that Petitioner met its initial burden of proving the mistake which permits the grant of zoning, so I dissent from the Board’s findings as to mistake.

I am not convinced by the evidence that Petitioner proved that there were incorrect facts concerning the subject property at the time of the 2005 Comp Lite, upon which the County Council relied in denying TNC Overlay zoning on the subject property.

I also am not convinced that the various facts relating to events occurring subsequent to the 2005 Comp Lite show that the premises upon which the decision to not grant TNC Overlay zoning to the subject property have been proven incorrect with the passage of time. While I agree that Normandy Shopping Center is in a difficult economic position in terms of its high vacancy rates, I find that the evidence shows that this position is at least in part due to its own poor marketing decisions and the current economic recession. Similarly, I do not believe that the lack of TNC development on the properties zoned TNC in the 2005 Comp Lite constitutes “subsequent event” mistake but is rather a simple mistake in judgment made by the County Council in 2005.

Therefore, while I do not believe substantial enough evidence has been produced to permit granting of TNC Overlay zoning based on mistake, I do agree that given the majority of the Board's decision that mistake has been proven, the Board's decision that TNC Overlay zoning on the subject property is appropriate given Normandy's present economic circumstances, and I join in that latter decision.

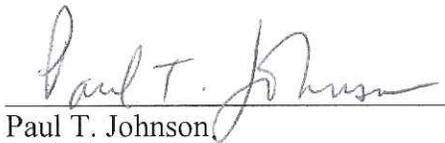


Robin Regner
Administrative Assistant



Greg Fox
Zoning Board Member

PREPARED BY HOWARD COUNTY
OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR



Paul T. Johnson
Deputy County Solicitor